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ABSTRACT

Legal methods and related case law that can be used by public higher education administrators to deal with intrusions by outsiders onto the campus are examined. The following legal factors related to control of campus access are addressed: risk management, police power, general trespass, school related trespass/loitering statutes, First and Fourteenth Amendment Issues, and the injunction. Part of the risk appraisal process is reviewing the realities, dangers, and liabilities of community access to public college and university campuses. Another process of the risk management concept is the inventory and subsequent development of means or countermeasures that can be focused on the appraised risks. Most of the rationale for protection of the campus is based on the statutory and constitutional authority of the state to protect the health, welfare, and safety of its citizens. The use of criminal trespass statutes in enforcing problems on campuses has met with varying successes. Most attacks, through litigation and judicial review, on cases of criminal trespass have been based on the grounds of lack of specificity of statutes. The First Amendment is the greatest operating doctrine affecting the issue of access control to public campuses. Seven suggestions for administrators are discussed: (1) practice risk management; (2) make effective use of counsel; (3) incorporate the attorney into the management team; (4) utilize a variety of legal resources; (5) examine significant legal decisions and issues related to campus access; (6) ensure counsel in using effective internal management practices; and (7) examine alternate models for legal service delivery. (SW)

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LEGAL FACTORS RELATED TO ACCESS TO CAMPUSES
OF PUBLIC COLLEGES AND UNIVERSITIES

AN OCCASIONAL PAPER

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INTRODUCTION

The openness of the public college and university campus has been an accepted given in the contemporary history of higher education. The campus, almost by definition, has been a crossroad and often the focal point for the cultural life of the institution and its environs. Kaplan points out this role by writing that "postsecondary institutions have been the location for many types of events which attract people from the surrounding community, and sometimes from other parts of the state, ~~country~~, and the world." He writes that "because of their capacity for large audiences and the sheer numbers of students, faculty, and staff on campus everyday, postsecondary institutions provide an excellent forum for speakers, conferences, pamphleteering, and other kinds of informational exchanges. In addition, cultural, entertainment, and sporting events attract large numbers of outside persons."¹

There is little doubt that the vitality and enriching climate of the American higher education process is highly correlated to this interfaced relationship which it shares with its external environment. The academy has progressed away from the cloistered, elitist institution that existed in the historical heritage of higher education.

Unfortunately, this openness posed altogether new dimensions for higher education administrators in the not too distant past. Suddenly, the vulnerability and accessibilities of the public college or university campus to both internal and external

disruptive forces became immediately evident. Blumer and Wistil found the following:

The late 1960's and early 70's brought to the campus a number of new concerns with regard to campus security. Panty raids, beer busts, and college pranks faded, far overshadowed by collective violence, sabotage, and higher crime rates. Street violence in response to the military draft and the United States intervention in the Vietnam War expansion into Cambodia brought building takeovers, highway blockages, bombings, and acts of arson. Class boycotts and strikes occurred frequently.²

Haplessly, the declining politicization of the American college student and the end to the Vietnam War related protests have not healed the residual scars and have not prevented an insipid new turn of events for the college campus. The vulnerabilities of the campus are still being exploited.

Again, Blumer and Wistil comment:

Educational institutions gained unwarranted notoriety through news media coverage of those protest activities. Some security directors believe that this public exposure was partially responsible for the dramatic increase in violent crimes, rapes, robberies, and even homicides on college campuses. ...Consequently crime prevention efforts are being increased on college property in order to cut down on the free access to college property.³

Blumer and Wistil, a university counsel and security director, respectively, observe "the desirable openness of the college community invites crime and makes security management difficult. Some administrators have been faced with weighing the value of openness against possible criminal activity and its impact on the college community."⁴ This is indeed a troublesome predicament for higher education.

This disturbing trend is well documented in the two-part chronicle and analysis of the recent events at Kent State University.

The campus police chief and a renowned criminologist faculty member traced the history and dynamics of the recent encampment/confrontation to halt construction of a campus gym adjacent to the site where four students were killed in the 1970 shooting. The authors developed the evolution of a localized anti-construction movement on the campus to an entirely new type of entity, a radicalized group known as the "May 4th Coalition" supported by a movement known as the "Revolutionary Student Brigade." Malone and Eastman described this movement:

In 1977, perhaps beginning in late 1976, a new type of activist movement seemed to take hold based on a cooperative effort of students and non-students, perhaps with control lying with the latter. It gained such impetus, that one might conclude that the era of independent student activity had passed and that a broader based coalition-type, anti-establishment movement was underway.⁵

Resulting data bore out their observations in numerous situations regarding the influence and frequency of outside participation. For example, when one series of arrests was made on July 12, 1977 in response to defiance to a court order, 125 out of 193 persons arrested at a campus sit-in were discovered to be non-students.⁶

Recognizing the recent Kent State University protests to be a larger scale activity based on emotional issues does not eliminate or lessen the vulnerability of other campuses to outsiders involved in criminal or disruptive influences. Possibly it is indicative of the need for countermeasures to deal with persons and influences, in the legal arena, when the safety and security of the campus community is threatened. Hall and Beck sounded the alarm in 1974 when they warned that "colleges and universities should give

advance consideration to appropriate actions to be taken if, disruptors are found to be students from other schools or non-students."⁷

The legalisms necessary for the maintenance of the campus community were predicted by Robert M. O'Neil, presently the President of The University of Wisconsin System, when he stated "colleges and universities will turn increasingly to the courts for protection against hostile external pressures and intrusions."⁸ Although O'Neil was talking about all external forces ranging from such things as regulatory agencies down to the campus burglar, the litigation factor he addressed could become more pervasive in public college and university administration.

Paralleling and coincident to the period of turmoil on the campuses there had been a redefinition, and some feel a circumscribing, of the powers of the university. Regardless of the feelings of philosophical stance of administrators and others either way, at least two concepts had emerged. First, it was during this crisis period that the law of higher education emerged, and secondly, constitutional protections were defined more exactly on campus, especially with regard to the First Amendment.

O'Neil writes:

Most of what we now describe as "law of higher education" was promulgated in a period of crisis. The vast majority of recent court cases involving colleges and universities grew out of the dismissal and suspension of students for campus protest activities. These cases deal with occupation of buildings, breaking of windows, blocking of entrances, disruption of R.O.T.C. ceremonies, and similar confrontations between students and administration. Many of the decisions define (in considerable detail) the procedures that must be followed in punishing student transgressors; other cases define the range of student conduct protected by the First Amendment.⁹

Commenting to similar observations with regard to the court decisions that developed in the emergence of the meteoric rise of the law of higher education, Glenny and Dalglish have remarked on certain matters with regard to the First Amendment. These higher education researchers stated, "yet at the same time that its members are protected as citizens, the university community as a polity, is much more prone than the citizens at large to exercise constitutional rights, especially those under the First Amendment."¹⁰

By way of introduction, we have examined the fact that public colleges and university campuses are increasingly vulnerable to crime and disruptive transgressions by outsiders as well as insiders. We have seen a call for administrators to develop legal countermeasures to deal with this problem, at a time that First Amendment rights are more refined and defined with regard to the behavior of individuals on these campuses. Let us proceed to explore the legal issues and processes related to controlling access to the campus.

Statement of the Problem

The question of intrusions by outsiders onto the campuses of public colleges and universities, that affect the physical security and safety setting of those campuses has been manifested in various forms in the past decade and a half. Despite the relative tranquility and assuagement from the demonstrations and protests of the late 1960's and early 70's, disorder and violence on campus appear to be taking on new forms. Public college and university administrators are enmeshed in a perplexing situation

of balancing college interest for security against the demands for public access by persons in the community. There is an urgent need for the recognition of practical and legally defensible measures and guidelines that may be utilized by college administrators to protect their campuses from outside persons who constitute threats.

Purpose of the Study

The purpose of this study is twofold: (1) to examine the legal means and some related case law used by public higher education administrators to control access to the campus, and (2) to make suggestions as to how these administrators, their counsel, and security directors might be better equipped to deal with these legal procedures.

Definition of Terms

The following definitions of terms used in this study are provided for the information of the reader in order to avoid any ambiguities or misconceptions.

Criminal Trespass---

(A) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he:

1. Had notice that the entry was forbidden; or
2. Received notice to depart but failed to do so.

(B) For purpose of this section:

1. "Entry" means the intrusion of the entire body.
2. "Notice" means:
 - a. Oral or written communications by the owner or someone with apparent authority to act for the owner; or
 - b. Fencing or other enclosure obviously designed to exclude intruders; or
 - c. Signs posted to be reasonably likely to come to the attention of the intruder.

NOTE:

Historically, trespass included unlawful entry or remaining on another's premises to commit some unlawful act. Today, most statutes define trespass as merely unlawfully entering or remaining on someone's premises. Continued unlawful entry after being put on notice constitutes trespass. In day to day living, any number of persons are permitted on another's property, though these persons can lawfully come onto the premises, they may by their conduct forfeit the right to be there. Once put on notice to leave, they must do so or subject themselves to prosecution for trespass.¹²

Injunction---

An order by a court prohibiting a defendant from committing an act injurious to the plaintiff.¹³

A writ prohibiting an individual or organization from performing some specified action.¹⁴

LEGAL FACTORS RELATED TO CONTROL OR CAMPUS ACCESS

Risk Management

A new and long overdue concept is finding its way into the administrative philosophies and practices of higher education. This development, known as risk management, originated in private enterprise in those industries such as insurance and with certain defense contractors that required a close attention to costs, security, and detailed monitoring of planning and analysis. Only recently have public agencies become vitally concerned with risk management in response to the increasingly restricted definition of "sovereign immunity," increased litigation, and tighter budgetary constraints.¹⁵

One subcategory of the risk management process is the need for risk appraisal. This is a generic term for analyzing all of our vulnerabilities and then acknowledging that something has to be done about them. Reviewing the realities, dangers and liabilities of community access to public college and university campuses is part of the risk appraisal process.

Another process of the risk management concept is the inventory and subsequent development of means or countermeasures that can be focused on those risks appraised. Although these are complex analytical and cognitive activities, suffice it to say the college administrator refining and reviewing his legal resources, proactively, is following through on the risk management system.

An integral feature of the risk management philosophy and practices is the prioritization of the many goals and objectives for dealing with the risks of the institution. One such priority to be considered is how the application of risk countermeasures will affect the image of the enterprise, in our case the public higher education institution. Do we wish to resort to elaborate security measures as several universities with urbanized settings have had to do, do we remain totally open and accept what comes our way, or do we have to position ourselves along the continuum in response to an analysis of multiple inputs? In our introduction, we assessed that there is a threat. Other inputs are the legal factors operative in our working milieu. Some of these are subsequently reviewed:

Police Power

Most of the rationale for protection of the campus is based upon an expansion to college campuses of the same safeguards afforded to elementary and secondary schools under the concept of police power. This concept is essentially the statutory and

constitutional authority of the state to protect the health, welfare, and safety of its citizens.

It has been as a result of police power provisions and interpretations access by outsiders to public campuses becomes restricted. Although the landmark case involved a public school setting, the doctrine is recognized as equally applicable to all public educational campuses. In the case of People v. Parker (1955) 208 Misc. 978, 138 NYS 2d 2, it was found, "the peace and safety of schoolchildren when threatened certainly called for the exercise of the police power of the state for their protection."¹⁶

Further, in People v. Parker, it was stated, "that the statute [NY statute, school trespass law] did not prohibit anyone from going on school premises to transact legitimate business. The intent of the statute is to prohibit some acts that are inherently wrong, the court said, and other acts not wrong in themselves are regulated, and others prohibited under such circumstances and in such places as may result in public disorder and cause some breach of the peace."¹⁷

Essentially, what we find from police power is the ability and authorization of the state to affect outsiders' access to public educational institutions. The scope and enforcement of police power by the state is not unfettered. Federal and state constitutions, as well as precedent from case law, shapes the scope of police power depending on the time, place, persons, and circumstances being regulated.

General Trespass

Kaplin has found that, "many states have trespass statutes which limit the use of a public institution's facilities by nonstudents, and sometimes students as well. Such statutes provide that a violation will result in excluding the offender from the campus. The violation of an order to leave made pursuant to the statute is usually a misdemeanor."¹⁸

It has been observed that in the definition of terms following the introduction to this study, a sample trespass statute was provided from the revised Texas Penal Code. This sample statute is typical in that it is general in nature and language, primarily to give it flexibility in application to any variety of fact situations. Unfortunately, the use of criminal trespass statutes in enforcing problems on campuses has met with varying successes. Even more so, loitering provisions in statutory law have undergone even more judicial scrutiny. Enforcement on campus, under criminal trespass statutes, was recently executed in the Kent State University disturbances in 1977, however.¹⁹

The legal treatise "Annotation, Validity and Construction of Statute or Ordinance Forbidding Unauthorized Persons to Enter Upon or Remain in School Building or Premises", hereafter referred to as 50 ARL 3d 340, comments on these general provisions. The annotation cites that the general statutes are "apparently inadequate to deal with the widespread increase in school disturbances in recent years."²⁰

Elaborating on this aforementioned point, the annotation reads:

Statutory provisions making certain acts of trespass punishable as crimes are quite common; they have usually been held constitutional. Similarly, statutes and ordinances in many jurisdictions make it a crime to "loiter" on a public street or in public places, but an increasing number of courts have struck down legislation directed merely at loitering, especially where the term is not defined or where circumstances under which the statute would apply were not sufficiently set out.²¹

Most attacks, through litigation and judicial review, on cases of criminal trespass have been based on the grounds of lack of specificity of statutes. Partially as a consequence to this, many jurisdictions have more specific legislative enactments to deal with the trespasser problem at schools and public campuses:

School Related Trespass/Loitering Statutes

Most authorities that have taken the time to track similar cases, draft well-written and constructed legislation, and ensure non-discriminatory enforcement, have developed effective tools for controlling access to campuses. These statutes are school related trespass/loitering statutes, often refined as a response to attacks and problems in breadth, scope, construction, and vagueness in the traditional criminal trespass and loitering statutes.

As was reported in 50 ARL 3d 340, the following comments are made:

...statutes and ordinances forbidding unauthorized persons to enter upon or remain on the school building or premises have been enacted in several jurisdictions. The validity of such enactments, often phrased in terms of trespass or loitering, but with specific reference to schools, has in most instances been upheld against attacks on a variety of grounds.²²

It appears that the success of these statutes has hinged on careful attention to factors as well as the careful wording and application of the statutes. The three variables that are relevant to the test of these statutes are: (1) legitimacy, the defendant's reason or reasons for being on or near the school; (2) distance, or the specifics of where the defendant was or the area covered by the prohibition; and (3) status, who the defendant was.²³

A review of the case law and statutes reveals a wide variety and array of differences in the wording of these statutes among the states and from city to city. Little has been done to standardize or make uniform these statutes. Many are worded to include college campuses, some refer only to schools, and some incorporate college into the definition of school.

First and Fourteenth Amendment Issues

The issue surrounding the impact of the First Amendment was initially discussed in the introductory portion of this study. Without a doubt, the constitutional amendment is the greatest operating doctrine that impacts on the question of access control to public campuses. As was explained by Kaplin:

A public institution's authority to regulate the use of its property is further limited by the federal Constitution, in particular the First Amendment, and may also be affected by state statutes or regulations applicable to state property in general or specifically to the property of state educational institutions. ...these limitations on institutional authority may provide right of access and use not only to faculty and students, but also the outside community.²⁴

However, and in general, many well-defined school trespass/loitering statutes have been held valid when tested against allegations that they violated First Amendment rights including freedom of speech. The rationales in several of these cases are interesting and worthy of note.

In an analysis of Kirstel v. State (1971) 13 MD App 482, 284 A2d 12, the following comment was made regarding the upholding to the trespass statute against the charges that it violated the First Amendment:

Although recognizing the rights of free speech and assembly are fundamental in a democratic society, the court observed that this did not mean that everyone with opinions or beliefs may address a group at any public place at anytime. Moreover, the court adopted the view that the public character of a university does not grant individuals license to engage in activities which disrupt the activities to which those facilities were dedicated.²⁵

Further, a "balancing of interest" doctrine appeared with regard to another similar case in which it was alleged, but not upheld, that a state statute against school trespass/loitering was in conflict with the First Amendment rights of the defendant. In the case of People v. Sprowal (1966) 49 Misc. 2d 806, an analysis read:

Observing further that the statute was not directed at freedom of speech, the court stated that that the fact that it might have a partial or incidental deterrent effect on free speech was justifiable and a necessary concession to the overriding public interest in the maintenance of order and the protection of pupils caused by the presence of unauthorized persons invading the precincts of the school.²⁶

Probably one of the most illustrative cases in which a statute was held invalid as a violation of the First Amendment guarantees was the college-related case of Grady v. State (1972, Ind) 278 NE2d. 280. The rationale for the holding was based upon the vagueness and construction of the statute, "in effect giving the school officials unfettered discretion as to the reasons for which they could ask persons to leave the premises and punishing disobedience to not depart from the premises."²⁷

Closely related to these First Amendment rights, Fourteenth Amendment questions regarding due process and equal protection (discrimination) issues have been raised in cases related to school trespass/loitering statutes. Generally, it has been found that a procedural due process administrative hearing is required to exclude a person from public premises.²⁸ Those school trespass statutes subject to being overturned for violation of the constitutional guarantee of equal protection of the law are those phrased in such ways that are not held applicable to "all" persons, and "that the criminal offense statute aspect of the statute apply to all persons, whether or not they were students, staff, or faculty."²⁹

The Injunction

Malone and Eastman's account both of the university administration's actions and the protester's actions during the Kent State University construction site encampment illustrates, by example, the use of both arrest for criminal trespass and arrest for violations of a court imposed injunction.³⁰

The latter process is gaining more attention.

At least two sources make reference to the injunction as a favorable means for dealing with the demands of outside parties to enter and do whatever they plan to do on the campus. Perhaps injunctive tools may be one of the best recourses, in many cases, for university administrators to utilize.

Hall and Beck have reported the court injunction as, "extremely successful in restoring order on campuses. Essentially, the court injunction guarantees the right to peaceful protest, but forbids actions which become violent or deprives others of their rights." Further, these researchers note that based upon what they have observed and studied, "in a vast majority of cases students have respected court injunctions."³¹

Rosenthal's work entitled "Injunctive Relief Against Campus Disorders" appeared in Volume 118 of The University of Pennsylvania Law Review in 1970. Quoting from this classic reference, the ARL annotator, paraphrased Rosenthal:

It has been observed that as an effective remedy for college administrators seeking to defuse explosive campus confrontations, injunctive relief against continuing trespass has significant advantage over criminal prosecutions: it avoids the immediate use of police, allows for a cooling-off period, interjects the court as mediators, is flexible in application, and has consequences that are not immediately harsh.³²

The development of the injunction as a resource in the repertory of the college or university administrator, might have been one of the concepts O'Neil was considering in his prediction that colleges would resort to the courts for protection against external pressures. The injunction is a

useful tool for many threats and unauthorized actions on the campus, but it is not without limitations. First, it is difficult to process an injunction request before the court if the college, as a plaintiff, cannot show good cause for the relief. Further, the college's processing of the request should be well documented, defensible, and well executed. Secondly, the injunction is not a suitable remedy against the one-time or spontaneous transgressor who might appear on the campus. Finally, university administrators must be aware that the defendant in such an injunction is not without his own remedy. There are procedures, under the Uniform Declaratory Judgments Act for the defendant to seek declaratory judgment against the ordinances and statutes restricting his campus behavior.³³

Summary

One of our stated objectives in this study was to examine some of the legal means and some related case law used by public higher education administrators to control access to their campuses. The reader has been introduced to the risk management concept and the subsequent legal inputs associated with the approach. The foundational concept of police power has been reviewed along with the status of general trespass, school related trespass/loitering statutes, First and Fourteenth Amendment issues, and finally the process known as injunction. What remains is for the reader to review some suggestions for dealing with these legalisms.

SUGGESTIONS

At this point in the study, the reader is somewhat familiar with the problems and vulnerabilities associated with the openness and attractiveness of the campus to outsiders and unauthorized persons. Additionally, an overview of the legal processes and climate existing with regard to controlling access to the public college or university campus has been briefly examined. Let us proceed to itemize at least seven (7) suggestions for an administrative approach to these issues.

(a) Practice Risk Management: Risk management has been lightly discussed in this paper, but it is a proposition of potential magnitude. Administrators should consider the incorporation of a risk management philosophy and implementation of the practices. The development of a total university protection policy has numerous advantages for the enterprise: (1) it forces a tighter accountability and protection of resources (human and non-human); (2) it generates a more secure, and consequently more comfortable environment; and (3) reduces institutional risks and vulnerabilities (i.e., litigation). A functional risk management program forces the administrator and his staff into action to assess the operation, the resources, and then hopefully prevent many of the legal pitfalls surrounding these risks. Cole explains that a risk management policy is a very powerful management tool.³⁴

(b) Make Effective Use of Counsel: With the complexities that we have acknowledged in this study, the need for counsel has been made more evident. Epstein writes that there are at least

six means for the administrator to make proper use of counsel:

(1) have one, (2) involve your attorney, (3) encourage the attorney to come-up with solid constructive advice and creative suggestions; (4) utilize the legal check-up approach, and (5) maintain institutional membership in the National Association of College and University Attorneys (NACUA). Epstein does not include this matter in his list, but makes the significant point, that is to, "ask the unasked questions; do not expect your attorney to devise your problems without help."³⁵

(c) Incorporate the Attorney Into the Management Team: Corbally notes the vital importance of the counsel in all administrative decision-making. He writes, "he [the attorney] will raise questions about processes and procedures and the nature of commitment."³⁶

(d) Utilize a Variety of Legal Resources: According to Beale, there are a variety of legal talents available to higher education. Each source has its distinct advantages and disadvantages. Depending on the level, scope, and type of question, we might wish to retain or consult the trustee's attorney, law professors, attorneys-general, private law firms, or our own full-time counsel. Further, Beale makes another point that is worthy of consideration, that is the possibility of the attorneys-general providing resident assistants at the large universities.³⁷

(e) Read, Brief, and Analyze Significant Legal Decisions and Issues Related to Campus Access: Blumer,³⁸ and Hopkins and Roha³⁹ stress the necessity for the administrator being well versed in legal issues and trends. This is important not only for effective administrative decision-making, but also in order to

discuss these matters proficiently with counsel. An administrator must equip himself and his staff with the ability to know the right questions to ask. The content of this study alone, dealing with campus access, has touched on at least a dozen classic and landmark cases. The administrator needs his own personal legal data bank.

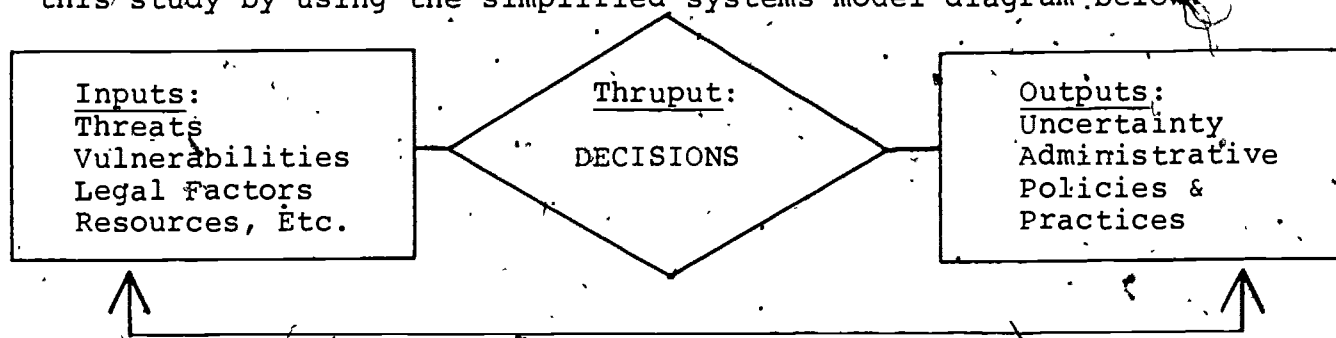
(f) Ensure Counsel in Using Effective Internal Management Practices:

Organization and efficiency in a law office is both an art and a science. Sensenbrenner offers several recommendations for maintaining efficiency for providing legal services to the college administration. Centralization of all campus attorneys is just one aspect of this. Specialized procedures such as opinion distribution, board agenda indexing, and citation files are among several practices he discusses and explains. The essential elements sought are the rapid digesting, retrieval, and dissemination of timely legal information.⁴⁰

(g). Examine Alternate Models for Legal Service Delivery:

Probably one of the most dynamic utilization models for counsel has been the recent development of the police legal advisor concept now used in many law enforcement agencies.⁴¹ Multiple roles and duties for the in-house counsel have been reviewed, experimented with, and promulgated. Possibly, some analysis and review of these alternate models for counsel might be well worth our while in light of the rapidly-changing legal climate on our campuses.

We might view the content and the broader implications of this study by using the simplified systems model diagram below:



The future outputs are uncertain with respect to the legal factors and other inputs concerning access to the campus. The essential ingredient appears to be the reactive and proactive behavior of higher education administrators to recognize, research, and deal with these issues.

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